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Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Utah v. Anselmo*, No. 14578 (Utah Supreme Court, 1976).
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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- :
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
14578

JOSEPH ANSELMO, :

Defendant-Appellant. :
----- :

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT OF GUILTY
IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE GORDON R. HALL,
JUDGE, PRESIDING

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FILED

AUG 8 - 1978

Clk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

Case No. 14578

-vs-

JOSEPH ANSELMO, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with the crimes of kidnapping and aggravated sexual assault in violation of Utah Code Annotated §§ 76-5-301 and 76-5-405 (Supp. 1973). He was tried to a jury in the Third Judicial District Court, the Honorable Gordon R. Hall, presiding.

DISPOSITION IN LOWER COURT

Appellant was found guilty by the jury for the above mentioned crimes. Sentence was imposed April 1, 1976, ordering appellant to serve an indeterminate term of zero to five years for kidnapping and five years to life for aggravated sexual assault, the terms to run concurrently.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this court affirming appellant's conviction in the lower court for aggravated sexual assault.

STATEMENT OF FACTS

Laura Margaret Lund received a phone call from a friend, Bonnie Christensen, on September 20, 1975, asking Laura to meet her at a restaurant in Salt Lake City (Tr.30). When Laura arrived she saw Bonnie standing with two men. She asked Bonnie what was going on and why the men were there (Tr.31). After discussion, Laura went with Bonnie to a laundromat and then to an apartment where she met appellant for the first time (Tr.35). While at the apartment appellant asked Laura to be his "old lady". She told him she was not interested but agreed to go with the group of people in the apartment to another house to celebrate Bonnie's birthday. The group of people went to a house on 3rd South and 1048 West to listen to music and drink (Tr.44). Shortly after arriving appellant told Laura to remove her bra or "we'll take it off for you " (Tr.45). Appellant then pulled Laura into a side room and began making sexual advances. Laura resisted physically and verbally and began yelling that she wanted to leave (Tr.8,49). Appellant then "pulled back his fist" and hit her in the face (Tr.49,50). Laura fell onto a bed still yelling that she wanted to leave and appellant hit her

again (Tr.50). She testified that she was scared, even hysterical and didn't know how or where appellant was hitting her (Tr.50,57). Laura said she had to go to the bathroom and appellant released her. He followed her to the bathroom and hit her again in the face (Tr.53). Appellant then pulled her back to the side room with Laura resisting and struggling constantly. She was released temporarily and pleaded with one of the women present to calm appellant because "that guy is going to kill me" (Tr.56). Appellant then dragged Laura back into the side room, held his fist on her throat and drew his other fist back. Laura testified that she didn't want to be hurt anymore, put her hand down and was raped by appellant (Tr.58).

Laura attempted to leave the next morning but appellant told her to "shut up and lay back down" (Tr.62). Appellant then raped her again after his friend, J.T. threatened her with a hammer (Tr.65). Laura was kept in the house until Monday morning when she finally escaped after having been raped twice more by appellant (Tr. 75-76, 210).

Laura was examined by a physician who testified that her face had bruises and abrasions but the doctor

was unable to determine if she was raped because of several factors (Tr.126,129,131). Laura also talked with the police and this conversation led to appellant's arrest and subsequent conviction of aggravated sexual assault (Tr.133).

ARGUMENT

POINT I

THE COURT CORRECTLY DENIED APPELLANT'S MOTION TO REDUCE COUNT II FROM AGGRAVATED SEXUAL ASSAULT TO SIMPLE RAPE.

Appellant contends that the trial court erred in denying his motion to reduce Count II to simple rape because "there was no evidence of a specific threat to kidnap Laura Margaret Lund, cause her death, or to inflict serious bodily injury upon her immediately." (Appellant's brief, p. 8). This contention has no foundation in the record of the trial, or in case law. Utah Code Annotated § 76-5-405 (1953, as amended), delineates the elements of aggravated sexual assault. It states:

"(1) A person commits aggravated sexual assault if:

(a) In the course of a rape or attempted rape or forcible sodomy or attempted forcible sodomy:

- (i) The actor causes serious bodily injury to the victim; or
- (ii) The actor compels submission to the rape or forcible sodomy by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person.
- (b) The victim of a rape or attempted rape or sodomy or attempted sodomy is under fourteen years of age.
- (2) Aggravated sexual assault is a felony of the first degree."

The record of the trial sufficiently establishes the elements mentioned in subsection (a)(i). Laura Lund testified that appellant made sexual advances and then hit her in the face with his fist when she resisted (Tr.49-50). The testimony was corroborated by appellant's own admission (Tr.184,200) and the testimony of other witnesses (Tr.116, 134,148). Laura began yelling and appellant hit her again (Tr.50). It appears from Laura's testimony that this attack made her hysterical. She stated that she couldn't tell how appellant hit her or where after the first blows (Tr.50,57,116,160). Appellant followed Laura into the bathroom and hit her again in the face with his fist (Tr.53). Laura testified that she screamed at one of the women present "that guy is going to kill me." (Tr.56).

It is well established that the kind of physical force that may induce fear in the mind of a woman is immaterial. People v. Harris, 108 C.A.2d 84, 238 P.2d 158 (1952). Certainly the force employed by appellant (a man 5'11" tall, weighing 205 lbs. Tr.212) was sufficient to cause Laura Lund to fear death or serious bodily injury. She neither knew appellant, nor did she know the other people present in the house except one woman. Appellant hit Laura in the face with his fist repeatedly and finally pushed one fist on her throat and held the other back prepared to strike her again, before she submitted to his attack.

While appellant did not specifically articulate his intent to kill or seriously injure Laura, such articulation is not necessary to constitute a threat. The general rule is that a threat in situations like the present may be expressed by acts or conduct as well as words. See State v. Bouldin, 153 Mont. 276, 456 P.2d 830 (1969) where a jury instruction to that effect was challenged on appeal and the giving of the instruction was affirmed by the Montana Supreme Court.

Appellant's conduct constituted a threat of death or serious bodily injury to Laura Lund. His

conduct indicated his persistence, his strength, his willingness to hurt and physically injure his victim, and his lack of concern for Laura Lund's pain or humiliation.

Appellant also threatened his victim with kidnaping. Laura testified that the first morning after she was raped she attempted to dress and appellant said "Where do you think you're going. . . shut up and lay back down." (Tr.62). Appellant then informed her that the windows were nailed shut if she had "any ideas about going through the windows. . ." (Tr.64). That threat was bolstered by the conduct of appellant's friend indicating that others in the house would detain Laura or injure her if she resisted (Tr.65). State v. Barnett, 85 N.M. 404, 512 P.2d 977 (1973) posits that it is immaterial in a rape case whether threats are made by the defendant or someone else.

Respondent maintains that appellant's conduct satisfied the elements of aggravated sexual assault. We reject appellant's claim that Utah Code Annotated § 76-5-405(a)(ii) contemplated the exclusion of an assault with bare hands. Appellant cites no case authority supporting that allegation. Moreover, it is common knowledge that people can and do kill with their

bare hands. Given the disproportionate size of appellant and his female victim it is reasonable to believe that Laura Lund considered appellant's violent attack a threat to kill her or seriously injure her. When appellant's assaultive conduct is coupled with the actual kidnaping of Laura Lund and the threat by appellant's friend with a hammer (Tr.65) the elements of Utah Code Annotated 76-5-405(a)(ii) are uncontrovertibly established.

On the basis of the foregoing, appellant's conviction for aggravated sexual assault should be affirmed.

POINT II

THE TRIAL COURT CORRECTLY REFUSED TO GIVE APPELLANT'S INSTRUCTION ON THE AMOUNT AND NATURE OF RESISTANCE REQUIRED IN A RAPE CASE.

Appellant proposed the following instruction on resistance:

You are instructed that the woman must resist the force of violence or threats of immediate or serious bodily harm directed at her to the extent that seems reasonable under the circumstances. Mere passive resistance is not sufficient. Resistance must be by acts and not by mere words. If a woman objects verbally to the act of intercourse, but by her conduct consents to it,

the element of lack of consent has not been shown beyond a reasonable doubt and you must acquit the defendant. Further, if her opposition appears after a period of apparent consensual behavior, that opposition to amount to resistance sufficient to constitute the lack of consent element of the offense, must be such that a reasonable man under the circumstances would have no question but that consent was being withheld. If you do not find such resistance beyond a reasonable doubt, you must acquit.

The court refused this proffered instruction and instead gave the following instruction:

"Without consent" means that Laura Margaret Lund was compelled to submit to sexual intercourse by force or fear that overcame such earnest resistance as she might reasonably be expected to have demonstrated under the circumstances.

To constitute the resistance required by the law of this State on the part of the female, the State must prove to your satisfaction, beyond a reasonable doubt, that the female manifested her opposition to the perpetrator of the act by doing what her age, strength, the surrounding facts and all of the attending circumstances make it reasonable for her to do to manifest that opposition, or to show by such proof beyond a reasonable doubt that she was prevented from so resisting by threats of immediate and great bodily harm accompanied by the apparent power or execution of such harm.

The amount or kind of force required to overcome the resistance required of the female is relative, depending upon the particular circumstances, but in any case it must be sufficient to subject and put the dissenting woman within the power of the man and thus enable him to have his intercourse with her not-

withstanding good faith resistance on her part. Thus, no particular amount of force or no particular kind of force is necessary so long as it is sufficient to overcome the resistance required of the female as hereinabove set forth.

However, in determining the sufficiency of the evidence to support a conviction of rape, you must consider the case of assertion of the forcible accomplishment of the act, the difficulty of disproving that assertion, and the proneness of a woman to minimize her fault by asserting force or violence or the requisite threats.
(Instruction 26; R. 440)

Respondent contends that the instruction given by the court was proper and correctly stated the law concerning resistance in a rape case. The instruction requested by appellant is misleading and misconstrues the amount and degree of resistance which the law requires of a woman who is raped. State v. Glidden, (Mont.) 529 P.2d 1384 (1974) at p. 1386 explains the amount of resistance necessary in a rape case. The Montana Supreme Court states:

"The law does not put her life into even greater jeopardy than it is already in. When a woman is dealing with a man bent on rape, how can she know how much resistance she can give without provoking him into killing her? Continuous resistance to an attempted rape is not required. This Court in State v. Metcalf, 153 Mont. 369 376, 457 P.2d 453, 457 (1969), held:

"The defendant does not, however, have the right to an instruction which, to the exclusion of some elements of a crime, would mislead the jury

to believe that constant physical resistance which required force to overcome was an essential element."

Appellant cites State v. Beeny, 115 Ut. 168, 203 P.2d 397 (1949) to illustrate a proper instruction on resistance in a rape trial. The facts of Beeny, supra, are much different than in the instant case. In Beeny, the prosecutrix met the defendants in a bar, was somewhat intimate with one defendant while in the bar, left the bar and then freely returned to be alone with the defendants in a car. Such conduct would warrant an instruction which explains that some resistance by the prosecutrix in the bar would not be sufficient to constitute resistance for an entirely separate episode considerably later and in a different situation.

In the present case, Laura Lund's resistance was substantial and lasted for several days. Considering the circumstances of her kidnaping and beating continuous resistance for over seventy-two hours would be unreasonable and impossible.

Appellant characterizes Laura Lund's resistance as "slight". (Appellant's brief p. 14). This description is inaccurate and contradictory to the record. Laura Lund testified that she pushed appellant away when he first made sexual advances. She began yelling and trying to get out of the side room where appellant had

her trapped (Tr.48-50). Even this amount of resistance produced a blow in the face from appellant (Tr.50). Appellant struck Laura again soon after without provocation. After these blows Laura still resisted and "struggled" (Tr.51 l. 27). She escaped to the bathroom where appellant hit her again and dragged her back into the side room (Tr.53). They continued to struggle and Laura escaped to the bathroom again (Tr.55). She was forced back into the side room and another struggle ensued (Tr.57-58). Finally appellant "got fed up with my fighting" and after another threat Laura was raped.

Laura Lund resisted the attacks by appellant both physically and verbally. She was scared, even hysterical and she had been hit brutally in the face at least three times by a large man. She could not escape and other people present were clearly not sympathetic to her plight.

The facts of the case establish that Laura Lund resisted to the extent (and beyond) that her age, strength, the surrounding facts and all the attending circumstances made it reasonable for her to manifest opposition. Moreover, such resistance was overcome by physical violence and imminent threat of serious bodily injury and death.

The court did not commit error in refusing appellant's proposed instruction on resistance in a rape case, and the conviction rendered below should be affirmed.

POINT III

THE COURT DID NOT ERR IN GIVING INSTRUCTION NO. 25 BECAUSE IT WAS SUPPORTED BY THE EVIDENCE AND WAS NOT INTENDED TO CONFUSE THE JURY.

The challenged instruction states:

An act of sexual intercourse is without the consent of the victim under any of the following circumstances:

1. When the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or
2. The actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution; or
3. The victim has not consented and the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist.

Appellant specifically objects to paragraph 3 above claiming that it was unsupported by the evidence and misleading to the jury.

Respondent maintains that the inclusion of paragraph 3 in the above instruction was not reversible error for the following reasons. There is support for

paragraph 3 in the record; it did not mislead or confuse the jury (nor was it calculated to) when considered together with all the instructions; case law condemns such an instruction where appellant has failed to show that the challenged instruction was prejudicial; and the overwhelming evidence against appellant prevents this singular instruction from being prejudicial under the circumstances, even if its presentation was improper.

The record indicates that Laura Lund became hysterical after appellant hit her several times (Tr.56-57, 160). Laura's testimony and the severity of the beating she received also suggest that she was in shock when the rape occurred. It is not unreasonable to believe that Laura Lund was physically unable to resist appellant's sexual attack because of her hysteria and shock. The jury was entitled to weigh the credibility of Laura's testimony and determine the effect and nature of her ability to resist. Paragraph 3 of instruction 25 properly posed the possibility that Laura Lund was physically unable to resist appellant's attack.

The rule concerning misleading instructions is found in State v. Coleman, 17 Ut. 2d 166, 406 P.2d 308 (1965) where this court states that generally all instructions should be considered together when

the giving of any one instruction is claimed as error. Paragraph 3 of instruction 25 was not reversible error when correctly interpreted and viewed together with all the other instructions.

The language of paragraph 3 is taken verbatim from Utah Code Annotated § 76-5-406(3). Appellant cites no cases or authority in support of his interpretation of "physically unable to resist." Moreover, the language of § 76-5-406 indicates that appellant's reading of subsection (3) is incorrect. Appellant interprets subsection (3) to include the use of drugs to incapacitate a victim. However, subsection (6) explicitly deals with the use of drugs and it is unreasonable to construe subsection (3) to include conduct expressly covered in another subsection. Subsection (3) also speaks explicitly of a victim being "unconscious" so that the phrase "physically unable to resist" logically implies another kind of helplessness. Subsection (3) gives no indication on its face that appellant's interpretation is valid. Rather the plain language of subsection (3) and the rest of § 76-5-406 contemplate exactly the kind of physical incapacity to resist which Laura Lund experienced.

A consideration of the other instructions also leads to the conclusion that paragraph 3 of Instruction 25 was not prejudicial or even improper. Instruction 37 (R.451) stated that all the instructions should be reviewed together and that no single instruction was to be singled out. Instruction 38 (R.452) explained that if an instruction only applies to a state of facts found not to exist (i.e. paragraph 3 of Instruction 25) then the jury must disregard the instruction. The jury was also warned that the fear of the victim must be the result of an actual source (Instruction 27, R. 441). In light of these instructions paragraph 3 of Instruction 25 was proper and was not prejudicial to appellant.

Case law dealing with allegedly improper instructions establishes the concept that if the giving of an instruction is deemed error it is not reversible error unless it is shown to be prejudicial. People v. Trujillo, (Colo.) 527 P.2d 52 (1974); People v. Barker, 180 Colo. 28, 501 P.2d 1041 (1972). No such showing is rendered here. Not only was paragraph 3 of Instruction 25 supported by the evidence but there was substantial evidence supporting the other parts of the instruction.

Laura Lund's resistance was reasonable under the circumstances and appellant's threats would prevent resistance by a person of ordinary resolution.

Appellant refers to State v. Pachecr, 27 U.2d 45, 492 P.2d 1347 (1972) in support of his claim that paragraph 3 of Instruction 25 was improper. Pachecr however, has little similarity to the instant case. In Pachecr, the defendant was charged with grand larceny (of a rifle). No other persons were charged with the crime or implicated in its commission. The trial court, however, instructed the jury that Pachecr could be found guilty of aiding and abetting in the commission of a felony, a crime for which he was not charged or tried. In the present case, the challenged instruction was taken verbatim from a statute concerning consent in sexual assault cases, the crime for which appellant was charged. There was evidence presented which justified each paragraph of the challenged instruction and the jury was cautioned to disregard instructions not supported by the facts.

Also, the Colorado Supreme Court in People v. Trujillo, supra, expressly authorized an instruction containing all the statutory sections on intent even though all sections were not applicable.

Under the above circumstances, the giving of instruction 25 was clearly supported by the evidence, did not mislead or confuse the jury, and was not prejudicial. Appellant's conviction therefore, should be affirmed.

CONCLUSION

Respondent maintains that the trial court correctly denied appellant's motion to reduce Count II to simple rape, correctly instructed the jury on the amount and nature of resistance required in a rape case and correctly instructed the jury on elements of consent. Wherefore, respondent respectfully submits that the conviction and sentence of the appellant should be affirmed by this Court.

Respectfully submitted,

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